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Designation of the Beneficiary of a Life Insurance Policy in the Event of Death

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A person who takes out an insurance policy on his own life obviously intends that, upon his death, some one should benefit from the proceeds. But the question that has long been debated among jurists is whether societal interests should be imposed upon the policy-holder, so that at least his spouse and children are made beneficiaries by virtue of the law, or whether he should be given maximum freedom in designating a beneficiary of his own choice.

Ethiopian courts are today divided over this same issue.** In a number of cases presented to the courts, the policy-holders designated persons other than members of the immediate family as beneficiaries of an insurance policy in the event of death. Upon the death of the insured person not only the designated party but also the spouse and children of the deceased claimed payment, the latter two on the basis of Art 701 (2) of the Ethiopian Commercial Code. The issue before the courts was whether the said provision entitled the spouse and children of the insured to benefit from the proceeds in spite of the fact that they were not mentioned in the policy, and despite the fact that a third party was expressly designated as the sole beneficiary.

A division of the High Court grants that, pursuant to the first sub-article of the named provision, the insured person can designate his own beneficiary, including persons other than the spouse and children.

But in reading this provision jointly with the second sub-article, it arrived at the conclusion that even if they are not designated by the insured, his spouse and children are at all times presumed to be beneficiaries of any life insurance policy in the event of death. Thus, according to this court, if the insured names his mother as the only beneficiary, the lady will have to share the proceeds with the spouse and children of the deceased (and other "heirs", according to the French version), inspite of the fact that they are not designated.

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**See the cases published in this Journal (ed.)

Quite clearly, this interpretation of the law follows the school of thought that rejects granting unlimited authority to the policy-holder in determining who the beneficiary should be. There are strong arguments to support this position.

To begin with, the policy-holder, more often than not, is the sole breadwinner. For that reason, it is his duty to provide for the sustenance of the family in the event of his death. Even if there is property to be inherited, the liquidation process is commonly such a protracted affair that its proceeds might not be available for the immediate needs of the household. On the other hand, insurance payments are supposed to be relatively easy to obtain in the form of cash.

Another argument involves the need to protect the common property. Since the proceeds of life insurance do not form part of the insured's estate and, hence, are not subject to the rules of succession, a life insurance policy destined to benefit persons other than the spouse or children can be used as a means of excluding substantial assets from the estate.

Designating a third party beneficiary can be particularly injurious to the surviving spouse, who would otherwise be entitled to half of the benefit had it formed part of the estate. One should also note that, most commonly, the insured pays the premiums out of his income,which, in turn, is a common property.

Consequently, it makes good sense to safeguard such vested interests of the spouse and children of the insured by making them beneficiaries to life insurance by virtue of the law, even when they are not so designated. In the opinion of the said division of the High Court, therefore, the Ethiopian law of life insurance in the event of death is motivated by these very concerns.

A division of the supreme Court is not persuaded by these arguments. Where there is a beneficiary expressly designated by the insured pursuant to the authority vested in him by the first sub-article of Art 701, the latter court reasoned, such a beneficiary is entitled to the entire proceeds of the policy.

Turning to the interpretation of Art. 701 (2), the Supreme Court ruled that the spouse and children of the insured would be entitled to the benefits only where no one is expressly designated by the policy-holder.

In sum, therefore, the two courts are at complete loggerheads. According to the first decision,sub-articles 1 and 2 of Art. 701 are complementary. A third party can be designated as beneficiary,but he will have to at all times share the benefit with

the spouse and children of the insured even where these are not mentioned as beneficiaries.

According to the second decision, however, the will of the policy-holder is supreme and, as such, whoever is designated by him gets all the benefits that accrue from the policy. It is only where the policy-holder dies without designating a beneficiary that his spouse and children would be able to claim the proceeds.

These divergent decisions by the two courts, have, if anything, thrown both policy-holders and insurers into total confusion, which is compounded by the absence of the principle of stare decisis in our legal system.

That is one reason why the above is not a simple case of High Court decision being reversed by the Supreme Court. If it were, the issue would have been much less significant. It is rather a situation where a lower court avowedly rejects a prior decision of a superior court. The High Court did acknowledge that a decision of the Supreme Court covering a similar fact situation had been brought to its attention; but the lower court declared that it did not agree with the interpretation by the Supreme Court of Art 701 of the Commercial Code, and that the lower court was not at any rate bound to conform to the judgement of the superior court. It therefore consciously arrived at a contrary conclusion. Quite evidently, these cases point up a timely question as to what position our legal system should adopt regarding precedence. That, however, is not the immediate concern of this paper.

Here we are concerned with the fact that the two decisions mentioned above follow different schools of thought that entertain totally opposed approaches regarding the question of designating a beneficiary in a life insurance policy. The two perspectives, in turn, reflect different levels of social and economic development. Hence,the question that deserves to be pondered at this juncture in the development of the legal system is as to which approach best serves the needs of present-day Ethiopia.

A very useful way of getting a fuller understanding of a particular provision of any law is to study its historical evolution. Thus, original drafts, subsequent changes, minutes of the Codification Commission,and parliamentary debates are vital tools. What is at present readily available to us as regards the Ethiopian Commercial Code is only the avant-project, which one finds reasonably helpful.

Even so, Professor Jauffret's[1] comments are woefully scanty when it comes to Art 701 of the Commercial Code. But in one interesting sentence he does give us a possible clue as to what that provision was intended to mean. "I have included," he wrote, "the most liberal solutions for the determination of the beneficiaries of the insurance in the case of death". Unfortunately, he tells us no more, not even what he meant by "most liberal" One has therefore to look further to determine what a "liberal" policy would be regarding the determination of an insurance beneficiary in the case of death.

In the same avant-project, Jauffret uses the term "liberal" on several other occasions. Making reference to the laws of some countries, for example, he notes that the validity of the life insurance contract in the event of death is not affected by the fact of the insured committing suicide. He then characterizes such a position as "too liberal", and himself adopts the opposite course in his draft of the Ethiopian law. As those other countries chose to continue to give effect to the will of the insured in spite of the act of suicide, Jauffret's use of the term "liberal" to describe that position leads one to conclude that he must also have employed the same term to impart the same idea regarding Art. 701, i.e., giving supremacy to the will of the insured.

This line of reasoning can be further supported by reference to the sense in which other countries employ the term "liberal". The French law of life insurance is of particular relevance because it has had considerable influence on its Ethiopian counterpart.[2]

Another reason why we should seek the meaning of liberality in the French law is because it is known to be one of the most liberal as regards the designation of a beneficiary of life insurance in the event of death. According to one commentator, "Les Regles due droit français (Art. 63, Loi 1930) relatives à la determination au

[1]The death of Professor Escara,the principal draftsman of the Commercial Code, occurred before the completion of the work. Hence, Professor Jauffret took over the task at a later stage and was responsible for the drafting of the section of the Code on insurance.

[2]Jauffret himself states that he "took into account many modern laws,especially the French law of 13 July 1930.." see Peter Winship, (ed.), Background Documents of the Ethiopian Commercial Code of 1960 (Addis Ababa, Faculty of Law, A.A.U., 1972), p. 83.

bénéficiaire sont excessivement larges et liberales, pour permettre, au maximum,la realisation du but poursuivi par le souscripteur".[3]

Thus, what is commonly understood as a liberal position regarding the designation of a life insurance beneficiary, at least among French legal scholars, is one that gives the policy-holder the least restricted freedom. Hence, one can reasonably conclude that, when Jauffret,a French legal scholar, declares that he chose the "most liberal solution", his intention was to give the policy-holder the maximum liberty in the choice of the beneficiary of his policy. This goal was accomplished under sub-article 1, where it is unambiguously provided "An insurance policy for the event of death may be made to the benefit of a specified beneficiary."

Having thus established the policy underlying Art. 701 by our reference to the draftsman's avant-project as well as to the European conception of a liberal policy regarding the designation of a beneficiary,what remains is the task of reconciling the second sub-article to the first.

To begin with, it has been argued that the first sub-article is totally consistent with the declared goal of the draftsman. It is the provision through which the draftsman intended to realize his goal of resolving the issue relating to beneficiary designation in the "most liberal" fashion. The term "most liberal" is, in turn,understood to mean a policy that places the least restriction on the right of the policy-holder to choose his own beneficiary.

Turning to the second sub article, it would be contrary to principles of legal drafting to assume that the draftsman included two contradictory provisions in the same article. In other words, sub-article 2 cannot be so interpreted as to defeat the declared objective accomplished by one sub-article earlier.

It should, however, be conceded that such an anomaly can occur in any legislation, especially if the original draft has been altered by people other than the draftsman. Such alterations may be carried out with less insight as to their effect on other provisions or even on the policy on which the entire law is structured. In view of that possibility, one may wonder if sub-article 2 of Art. 701, assuming for the moment that it contradicts the first sub-article, is a later addition or modification by either the Codification Commission or Parliament.

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[3] J. Hellner and G. Nord (ed.), Life Insurance Law in International Perspective, Reports from an International Colloquium (Stockholm, 1969), p. 29.

But there is almost conclusive evidence that this was not the case. Jauffret's draft of the section of the Commercial Code on insurance was accepted by the Codification Commission without any alteration. The hand-written remark addressed to Jauffret, on the first page of the draft,believed to have been written by a member of the Codification Commission, states that the draft was "wholly accepted".[4]

That the present content of Art 701 is exactly the same as the one in the original draft is further evidence that neither the Codification Commission nor Parliament introduced any change in Jauffret's draft.[5]

The Meaning of Sub-art. 2 of Art 701

An effort has been made to establish the legislative policy underlying the Ethiopian law of life insurance as regards the designation of a beneficiary. It has also been submitted that the original draft designed to reflect the said objective has not been altered at any time during the legislative process. Finally, it is clear that sub-art. 1 of Art 701 fully accords with the declared legislative policy, since it gives the policy-holder a free hand in determining the person to whom the benefit should go.

Hence, interpreting sub-art 2 of Art 701 - as did one of the courts - to mean that the spouse and children of the insured are at all times beneficiaries of a life insurance policy in the event of death, even where a third party has been expressly designated as the sole beneficiary, would contradict the basic policy underlying the whole provision and defeat a goal attained in the preceding sub-article. For that reason alone, the said interpretation should be rejected.

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[4]Peter Winship derived the same conclusion when he wrote, "The Codification Commission apparently accepted Professor Jauffret's draft without amendments: the copy of the text in the Archives of the Faculty of Law, (Addis Ababa University)has a note at the top of the first page (thought to be in the handwriting of Maitre Perdikis, a member of the sub-commission) stating that the text was accepted without amendment." See P. Winship, cited at note 2 above,p. vi.

[5]The only discrepancy relates to a curious omission from both the Amharic and English versions of the word "heir", found in the original draft. Even here, the discrepancy could not have been due to change made in the draft, since the French master-version of the Commercial Code still contains the word.

Other arguments can, however, be marshalled in support of the foregoing conclusion. Consistently with its declared "liberality", the law empowers the insured to evoke the allocation of the benefit to a specified beneficiary so long as the latter has not accepted the benefit (Art. 703 (2)). If, on the other hand, the spouse and children are deemed to be beneficiaries, by virtue of the law and independent of the will of the insured, there would be no point in authorising the insured to change his mind as to his earlier allocation of the benefit. Once again, an interpretation of sub-article 2 of Art 701 which would lead to such an anomaly cannot be allowed.

Furthermore, the said interpretation would render worthless the use of life insurance policy as a modern tool for a business transaction. Nowadays, it has become common practice in many developed countries for a person to take out life insurance in favour of his creditor, by way of guaranteeing the performance of a certain obligation.

It has also been quite some time since this practice arrived in Ethiopia. Take, for example, the case of the thousands of people who have borrowed money from the Mortgage Bank to build homes. As a condition for obtaining the loan,each one of them had to take out a life insurance policy designating the bank as the sole beneficiary.

The Ethiopian insurance law, as a modern piece of legislation, recognizes such use of a life insurance policy. Article 692 (2), for instance, envisages a situation where the insurer may undertake to pay upon the death of the insured a specified capital "to those having rights from the insured person ..."

Article 697 further clarifies this point by expressly permitting the pledging of a life insurance policy.

Interpreting Art 701 (2) in a manner that would limit the free will of the insured would not only be contrary to the spirit of the above cited two provisions but would also produce a ludicrous result. In the case where the Mortgage Bank is the sole beneficiary, for instance, the proceeds would have to be shared by the spouse and children of the insured, thereby defeating the whole purpose of the transaction and rendering totally ineffective the use of life insurance as a pledge.

On the basis of the above arguments, it is submitted that the interpretation of sub-art. 2 of Art. 701 to the effect that the spouse and children of the insured should get some portion of the benefit, even where the insured dies having designated some

one else as the sole beneficiary,should be rejected as contrary to the policy underlying the law as well as to several of its basic provisions.

Having said that, one has to examine the alternative interpretation given to the provision in question by the second court. Here, the court recognizes that, under Art 701 (1), the insured is at liberty to designate a beneficiary other than his spouse or children, and that, where he does so, the designated beneficiary gets the entire proceeds of the policy.

With regard to the second sub-article, the court took the position that, even where the insured fails to designate them, his spouse and children become, by virtue of the law, beneficiaries of a life insurance policy in the event of death.

Then the court had to reconcile these two contradictory positions, which task it achieved by concluding that the un-designated spouse and children would be able to collect the benefit only where the situation envisaged under the first sub-article does not come into the picture, i.e., where the insured fails to designate a specific person. Thus, consistently with the above noted legislative policy, the court upheld the supremacy of the will of the insured. And to that extent, its decision is correct.

This writer,however, wishes to take issue with the court's interpretation of the second sub-article of the provision. According to this court, the effect of the said sub-article is to make the spouse and children of the insured beneficiaries where he dies without indicating who the benefit should go to.

Nevertheless, the law is absolutely clear as to what the destiny of the proceeds of a life insurance policy should be where the insured dies without designating a beneficiary. Both the Civil Code (Art 827) and the Commercial Code (Art 705) provided that it "shall be paid into the subscriber's estate", thereby forming part of the inheritance. The unanimity of the two codes on this point, and the absence of ambiguity in the languages of the two provisions, leave no room for interpretation. Hence,no construction of Art 701 (2) of the Commercial Code, which contradicts the above cited provisions, as does that of the above named court, can be allowed to stand.

What should the interpretation of Art. 701 (2) be and what purpose was it designed to serve? To answer those questions, one needs to look more closely at the wordings of sub-articles 1 and 2 of Art. 701.

Under the first sub-article, the subscriber is authorized to make his life insurance policy to the benefit of a *"specified"* person. What does "specified" mean? In other words,how specific should the subscriber be? The question is all the more significant because very many subscribers do not want to commit themselves irrevocably, in view of the unpredictability of their future relationship with the beneficiary. As a matter of fact, in some countries "only exceptionally will a particular person be designated as beneficiary by name".[6] (p. 18, Stockholm).

Under Danish law, for example, "If the policy-holder wants his spouse to receive the insurance proceeds entirely,he can obtain this result by designating as beneficiary "spouse", and he, therefore, need not mention the spouse by name. If the policy-holder wants his children to take the insurance proceeds,he can use as beneficiary designation the expression "children", (without having to mention each child by name)."[7] (p. 17, Stockholm).

That being the case, no insurance law would be complete without a provision that regulates the usage of generic terms in designating beneficiaries. It is submitted that Art. 701 (2) is designed to serve that very purpose in the Ethiopian law of life insurance.

To substantiate this proposition, let us further examine the content of Art 701 (1), which authorizes the subscriber to make his life insurance policy benefit a "specified" person or "specified" persons. The question has been raised as to how specific he should be. One can find the answer, albeit indirectly, in the second sub-article. Under that provision, a certain category of people are "deemed to be specified beneficiaries notwithstanding they are not mentioned by name" (emphasis added). Hence, the word "specified" under the first sub-article should mean mentioning the beneficiary by name, failing which the requirements of that provision would not be satisfied.

Such a condition, obvisouly, has many advantages. It serves the interests of subscribers who are absolutely certain as to the person(s) to whom the benefit should go. Secondly, if names are mentioned, the wishes of the subscriber become so categorical that the possibility of disputes arising over who the beneficiary should be is almost nil.

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[6] Hellner and Nord, cited at note 3 above, p. 18.

[7] Ibid., p. 17.

On the other hand, requiring that degree of specificity of all subscribers would not be a practical proposition. As noted earlier, in very many countries, only a minority of life insurance subscribers wish to identify by name a particular beneficiary in the event of death.

Unsure of what the future may have in store, many subscribers refuse to commit themselves irrevocably. Under Ethiopian law, for instance, "The allocation of the benefit of a policy to a specified beneficiary may not be revoked after the beneficiary has agreed to the policy" (Art 703 (1)) of the Commercial Code; (see also Art 1961 (1) of the Civil Code). The consequence of such an arrangement can be fully grasped if one considers a person who, desirous of providing financial security for his family, takes out a life insurance policy for the event of his death. Suppose he designates "Tamima", his wife at the time, beneficiary. Tamima readily accepts the policy. Sometime later, the two are divorced, and each gets married to another person. Assume also that the subscriber has a number of children from his new wife and none from the previous one. All the same, the proceeds would go to Tamima,thereby defeating the whole purpose behind the policy.

It is to guard against such eventualities that many a subscriber prefers to use a generic term such as "my spouse" or "my wife" in designating a beneficiary.

Consider also the case of a subscriber who wants his children to benefit from the policy. If he mentions by name those that were already born at the time of subscription,those might be the only beneficiaries. But that would be contrary to the intention of a subscriber who wants all his children, including those born after he took out the policy, to benefit. That consideration explains why many people prefer to use "children", "offspring", or similar generic terms, to mentioning individuals by name.

Another word commonly employed by subscribers in "heirs" (which word, as noted earlier, is found in the French version of Art 701 (2) of the Commercial Code but does not appear in either the Amharic or English versions). If the subscriber mentions by name his heirs as beneficiaries, the same question as arose in relation to children might arise.

What Art 701 (2) does,therefore, is to recognize and give sanction to the use of generic terms in designating a beneficiary. In other words, if the subscriber prefers to use words such as "my wife", "my children" or "my heirs", persons who fit those characterizations "shall be deemed to be specified beneficiaries notwithstanding that they are not mentioned by name"

This position, incidentally, is consistent with that of the French. In the words of A. Besson,

> *Sans doute rien n'empêche de faire une désignation nominative (précise), auquel cas le bénéficiaire est nettement déterminé. Male la détermination est suffisante lorsque le bénéficiaire est désignê au moyen de qualités (familiales, professionnelles, sociales) permettant de découvrir avec certitude,? ne serait; ce qu'âl'échéance du contrat, celui au profit dequel le souscripteur a entendu stipuler: il suffit que le beneficiaire soit determinable, Est ains parfa.:ement valuable la designation faite au profit de la femme et, de facon plus generale, au profit due conjoint de l"assuré ...*[8]

Art. 701 (2) also addresses other issues that often arise in relation to the use of generic terms in designating beneficiaries. In the case where the word "wife" or "spouse" is used, the question often is which one? The spouse subscriber was married to at the time of subscription, or his legal wife at the time of his death? Where the subscriber was not married at the time of subscription but got married later on, Art 701 (2) is unambiguous. Such a wife is the proper beneficiary.

But if the subscriber was married to X at the time of subscription,divorced her and was married to Y at the time of his death, the language of the law is not sufficiently clear. Even so, it seems to recognize the marriage that was concluded "after the policy was entered into". That position can also be supported by invoking the *raison d'etre* for such a policy,which, more often than not, is to provide for the sustenance of the immediate family after one's death.

Further support may once again be sought in the French law, where it is held "En cas de dissolution du marriage (mort ou divorce), la designation profit automatiquement á la second feme ou au second conjoint".[9]

As regards "children", the provision in question is clear: not only children born before the subscription but also those born later are included as beneficiaries. In French law, "non seulement les enfants ou descendants nes ou concus au moment de

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[8] Ibid., p. 29.

[9] Ibid.

la stipulation, mais encore les enfants ou descendants á naitre, au quel cas les bénéficiaires sont determines, selon cette qualité, á la mort de l'assure".[10]

Conclusion

There were times when it was almost universally believed that the primary purpose of a life insurance policy in the event of death was to protect the members of the immediate family of the insured against sudden deprivation. The then prevailing social and economic conditions justified this attitude. Of particular significance was the fact that the man was, more often than not, the sole breadwinner, so that his death almost inevitably meant a serious economic crisis for his dependents. Most frequently, therefore, it was to forestall such a crisis that men took out life insurance. Hence the identification of a life insurance policy with the interests of the immediate family of the insured. This state of affairs was, in turn, reflected in the old laws of many European countries.

With increased modernization, however, things changed radically. To begin with, at least in the modern sector of most economies, the man is no longer the only member of a family who earns an income. Secondly,many countries have developed a variety of social security schemes so that the death of the head of a family no longer portends extreme economic difficulty for its members. Thus, providing for the sustenance of a family ceased to be the primary objective of a life insurance policy in countries where these changes occurred.

In the meantime, the business world found new uses of a life insurance policy. It was discovered, for instance, that it is one of the best ways of securing someone's obligation.

Then, the law had to catch up, even if belatedly, with the changed circumstances. In most countries of the developed world, this meant placing greater emphasis on the free will of the policy-holder.

As noted by Jauffret, it was this liberal position that Ethiopia adopted with regard to the designation of beneficiaries of a life insurance policy.

One can, of course, question the wisdom of adopting such a stand in a country where social and economic conditions are fundamentally different from those of

[10] Ibid.

Europe. Ethiopian policy makers were not unaware of this fact. Yet, they were convinced that modern laws could be used to force Ethiopia onwards to the current stage of the modern world. Besides, a modern insurance law would help attract foreign capital - the mainstay of the then developmental policy of the country.

On the other hand, the policy makers must have accepted the inevitability of a period of tension between local conditions and the super imposed alien law. The decisions of the two courts discussed above are, in a way, reflections of the said tension. In this regard,one of numerous questions judges will have to address is how to protect the interests of the spouse within the context of a law that upholds the supremacy of the will of the insured.

Most countries that have liberal life insurance laws - including the U.S.A., France and the former West Germany - have recognized the need for such protection if the interests of the surviving spouse so require. On several occasions, their courts have set aside the will of the insured, despite the fact that their laws do not expressly authorise interference with the freedom of the policy holder in determining a beneficiary.

The most common case in many western countries is where a married man designates his mistress as beneficiary. Courts have consistently held such designations control bonos mores and gave the benefit to the wife, even though she was not expressly designated as beneficiary.

Thus, it appears that this is a better compromise approach to bridge the gap between those who believe that life insurance should exclusively benefit the immediate family, and those who stress the supremacy of the will of the insured. While recognizing and giving full effect to the will of the insured who designates a third party as a beneficiary for perfectly legitimate reasons, it leaves room for the invalidation of the designation when it is contrary to morality or good faith.

It is, however, submitted that such an option is not available to Ethiopian courts confronted with a situation where a policy-holder may abuse his right to name a third party in a manner offensive to our sense of mortality, or where the court is persuaded of the existence of fraudulent conduct. It is true that, as a special contract, life insurance law is governed by the general principles embodied in Title XII of the Civil Code. The court can, therefore, invalidate the insurance contract on grounds of immorality if such exists. But the consequence of invalidation under Ethiopian law does not lead to the same solution as the one that flows from the equity-based

decisions of the United States or European courts - which is, for instance, substituting a beneficiary not designated by the policy-holder in the place of the one designated.

The result of invalidation under Ethiopian law is the reinstatement of the contracting parties, i.e., the policy-holder and the insurance company, to positions they had held before they entered into the contract. This in effect means two things:

First, the insured gets back whatever he paid in premiums and possibly plus interest,and not the proceeds stipulated in the contract. Quite obviously, there can be a substantial difference between the two amounts.

Secondly, since the insured is dead by the time these issues are raised, the proceeds of the reinstatement go into the estate of the deceased, and not to a particular person who, by equity or moral considerations, should have been the beneficiary.

Thus, by invalidating, the court would in effect destroy the essence of the contract without attaining its objective of doing justice to the insured party.

The course which may possibly lead to the desired goal would be to vary the contract, that being what substituting a designated beneficiary by one who is not so designated may amount to. Yet the Ethiopian law of contracts, strongly grounded on "Freedom of Contract", emphatically exhorts that "courts may not vary a contract or alter its terms on the ground of equity except in such cases as are expressly provided by law" (Article 1763). The narrowly circumscribed exceptions (Arts 1766-1770) do not at all permit the degree of variation that would be necessary to replace one beneficiary by another. In light of this fact, Jauffret's assertion that he chose the "most liberal solution" makes complete sense.[11]

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[11] A less satisfactory solution may be obtained by invoking unlawful enrichment (Art. 688 of the Civil Code), whereby the spouse "who proves that the personal property of his spouse has been enriched to the prejudice of his own personal property or of common property", may be awarded indemnity.